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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1223~~ 102

In the Matter of

RICHARD HOWARD JONES, *An Attorney,*

Respondent-Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Petitioner-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

RALPH B. RAUKX
Attorney for Appellant
Office & P. O. Address:
55 West 42nd Street
New York, New York 10036
Code 212, Tel. 565-3618

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPELLANT'S JURISDICTIONAL STATEMENT

The Appellee has moved, pursuant to Rule 16, Subdivision 1, of the Revised Rules of the Supreme Court of the United States to dismiss Appellant's appeal from the Court of Appeals of the State of New York's order dismissing appellant's appeal to the said Court of Appeals on the ground that the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department appealed from did not present any "substan-

tial constitutional questions". The Appellee moves on three grounds, to wit: (1) that the appeal is not within the jurisdiction of this Court, because not taken in conformity to Revised Rule 13, subdivision 1; (2) the appeal presents no substantial federal questions, and (3) the judgment rests on an adequate non-federal basis.

Preliminary Statement

Appellant has briefed the question of whether or not the appeal presents any substantial Constitutional questions, in his jurisdictional statement, filed in this Court on April 15, 1966, at pages 20-25, thereof. To repeat it here would be redundant. Therefore, as to that issue, appellant will rely upon the points and cases presented on the pages of the jurisdictional statement, above referred to.

The appellee has not properly stated the facts involved in the proceedings. There were six (6) charges or complaints made to the appellee about the appellant. In the instance of each complaint made, appellant, upon receipt of letters of charges from the appellee, answered the letters, and in the instances involving checks returned unpaid, alleged the return of such checks. Notwithstanding the admission of the return of the checks, the appellee proceeded to subpoena appellant's bank records, not to determine whether or not the check had been returned, but to determine how many others were returned on that particular account. For that purpose, appellee subpoenaed the appellant's accounts, in each instance, from the date the account was opened, to the date it was closed, or if still in operation, up to the date the subpoena was returnable. While the Rules of the Appellate Division, First Department pre-

scribe the method of issuing such subpoenaes, there is nothing in the record to show that the rule was complied with. While the banks responded to the subpoenaes as served upon them, and produced the copy served upon them at the hearings, that is no proof that the subpoenaes were either issued or served in accordance with the statutes. The best evidence of such service would have been the original subpoenaes which would have borne not only the signature and stamp of the said Appellate Division, but the affidavit of service made by the process server who served the subpoenaes. However, the only testimony that was forthcoming from Appellee's office with respect to the whereabouts of the original subpoenaes was given by Louis B. Reynolds, Esquire, one of appellee's staff attorneys, to the effect that in ridding the file of excess papers, he tore up the originals of the subpoenaes, because he didn't think they would be needed (see, Jurisdictional Statement, p. 23). None of the bank witnesses could testify as to how the subpoenaes were served, since none of them actually received the subpoena when it was served.

In addition, the bank charges, in so far as they related to the six (6) specific complaints of misconduct—two of which were dismissed, i.e. found not sustained, by the referee, and the other four of which were found not sustained in so far as any misconduct was concerned, by the referee—were included in the specific charges of misconduct; therefore, there was no need for the bank charges, unless the appellee was on a fishing expedition, looking for additional charges to make against the appellant.

Appellant wishes to add that the Referee who heard the charges was the Hon. John A. Mullen, who, at the outset, was acting as an Official Referee, he having retired from

the bench after a long and distinguished record of service. However, during the hearings, due to Court reorganization, he was reinstated as a Supreme Court Justice, during the proceedings against appellant. Mr. Justice Mullen has heard many disciplinary proceedings, and has a reputation for fair play and integrity in these proceedings. Yet, the Appellate Division found it necessary to overrule him, and find as it did, without stating any basis therefor.

ARGUMENT

I.

All of the orders enlarging appellant's time to docket his appeal and file his jurisdictional statement were timely served and filed with the Clerk of the Appellate Division, First Department.

The appellee's contention that the Appellate Division, First Department had no jurisdiction to make the enlargement orders it entered dated February 21, 1966, and March 31, 1966, and that this Court is, therefore, without jurisdiction to entertain this appeal is without merit. Rule 13, subdivision 1, of the Revised Rules of the Supreme Court of the United States requires the first application for an enlargement of time to be presented to the Clerk of the Court in which the application is made, within the original sixty (60) day period. The application for the order was timely filed, on February 14, 1966; however, since appellant had to give appellee notice of the time and place it would be presented for signature, the notice recited that order would be presented for signature on February 16, 1966, when it was so presented and signed.

Appellant respectfully submits that Section 13, subdivision 1, does not state that the Court possessed of the record cannot make an extension of time, other than an enlargement of the original sixty day period, nor does it say that the court possessed of the record is without discretion to grant an enlargement of time after the expiration of the period sought to be enlarged. Those restrictions are placed only upon the Justices of the Supreme Court, by Section 34, subsection 2, of the said Revised Rules of the Supreme Court of the United States.

Appellee's contention that the order of enlargement dated March 31, 1966 was improperly granted is based upon its contention that the order of February 21, 1966 was invalid, since there is no question as to the timeliness of the submission of that order for signature.

Similarly, appellant is hard put to understand how the envelope in which appellee received the notice of presentation of the order of enlargement dated February 21, 1966, came to be dated "FE 16 AM, 1966". The letter was placed in a mailbox in front of General Postoffice, in New York City, just about midnight, Monday, February 14, 1966; therefore, it was mailed on the night of the 14th of February and running into the morning of February 15, 1966. It should, under no circumstances, have been postmarked for February 16, 1966.

Appellant respectfully submits that the order signed by the Appellate Division, First Department, dated February 21, 1966, enlarging appellant's time to docket his case to March 31, 1966, was timely submitted, and properly signed by the said Appellate Division, and that the order signed by the said Appellate Division on March 31, 1966, the last day of the enlarged period, was timely made and filed, and

that this Court, therefore, has jurisdiction to entertain the appellant's appeal.

II.

The judgment below, as to which the New York Court of Appeals entered its order of dismissal which is here on appeal, does not rest on any adequate non-federal basis.

Appellee's contention that appellant has raised no question on the merits of the charges other than the check charges and no constitutional questions with respect to the charges is totally untrue. Appellant's entire brief on the motion and cross-motion to confirm and disaffirm the Referee's Reports was dedicated to an attack upon the evidence, the sufficiency of the evidence, the competency of witness, and the like. Similarly, in appellant's affidavits in opposition to appellee's motion to dismiss appellant's appeal to the Court of Appeals, appellant raised issues as to the sufficiency of the evidence, the competency of witness, and the like, all directed towards getting a determination as to whether or not the decision rested upon solid non-federal grounds. In refusing to hear the appeal, the Court of Appeals deprived appellant of a determination on those questions, as well as upon the constitutional questions presented. There were alleged complainants, as in the Delaware County charge, with whom appellant was never confronted. Conflicts in testimony, and admissions of incompetent testimony and exhibits pervade the record. It is therefore a misrepresentation of the facts, when appellee states that appellant has not raised any issue as to substantive guilt of the charges. The entire hearing was

based upon whether or not appellant was guilty of the substantive charges. Therefore, appellant could not raise an appeal, without attacking the substantive aspects of the proceeding.

It so happens that the appellant placed emphasis upon procedural matters in so far as the check charges are concerned, because this is the area in which appellee feels that appellant completely overstepped the bounds of propriety. It completely disregarded appellant's rights, and commenced a witch hunt for additional evidence to bring additional charges against the appellant.

Appellee has cited *Matter of Flannery,* 212 N. Y. 610 (1914), and *Matter of Goodman,* 199 N. Y. 143 (1910), as authority for the proposition that review in the Court of Appeals, in disciplinary proceedings, is limited to the consideration of the single question of whether the finding of guilt has any evidence to sustain it. Appellant respectfully submits that in his jurisdictional statement, appellant attacked this very theory, and in so doing stated that it denied attorneys, as a class, the equal protection of the laws. Appellant further submits that it is precisely for the purpose of getting the Court of Appeals to review the entire proceeding before the Appellate Division that appellant has prosecuted this appeal before this Court.

It is no secret within the City, and indeed, appellant believes, within the State of New York, that the appellee rides rough-shod over attorneys under its jurisdiction; so much so, that when an attorney receives any kind of communication from appellee, he panics immediately. He is aware that appellee is not out to help him adjust his differences with those who complain against him. He also knows

that, except in rare cases, he has no recourse against the actions of the appellee, since the appellee is not at all loath to tell you that the Appellate Division will go along with whatever appellee suggests, in so far as disciplining an attorney is concerned. This in itself makes a mockery out of the proceedings conducted prior to meting out discipline to an attorney.

Further, the appellee prides itself in exclaiming that the Appellate Division, First Department has never reinstated an attorney it has disbarred. All of the other Appellate Divisions are more tolerant in their attitudes towards reinstatements, and are much more meticulous in the rules they have promulgated to govern disciplinary proceedings. All of this shows that other Appellate Divisions have given some thought to the rights of attorneys, and to the consequences of such a harsh punishment as disbarment, and have taken precautions to see that the attorney gets every protection and every possible consideration, even before the proceeding is instituted, and certainly during the proceeding.

A typical illustration of the attitude appellee has with respect to attorneys in disciplinary proceedings occurred at the hearings in the proceedings before the Referee on the check charges herein. When it was not establishd to appellee's attorney's satisfaction that a certain subpoena had been served upon a bank, the attorney volunteered the statement that he remembered having served the subpoena himself, along with another subpoena in another matter. He was required to take an oath as a witness as a prerequisite to taking his testimony; however, upon being cross-examined it developed that he was not telling the truth, and he asked for permission to retract his statements.

At the suggestion of the referee, Appellee consented to have the testimony expunged from the record.

The appellant is confident that the record below would not be sustained on an appeal prosecuted either in the Court of Appeals of the United States, or the United States Supreme Court. The errors in the record are glaring. The irregularity of the proceeding, plus the long delay in prosecuting the proceeding, which caused it to drag on for four years before it came to a conclusion, all are in violation of appellant's constitutional rights. And, above all, the evidence adduced at the hearings was insufficient to sustain the decision appealed from.

III.

Appellant incorporates into and makes his jurisdictional statement a part of this brief for purposes of this motion.

Appellant incorporates into, and makes his jurisdictional statement, filed April 15, 1966, a part of this brief in opposition to appellee's motion to dismiss appellant's appeal to this Court from the Order of the Court of Appeals of the State of New York.

Appellant submits that there is no merit to appellee's claim that the judgment below is based upon adequate non-federal grounds to support the court's decision, and the refusal of the Court of Appeals to hear the appeal.

CONCLUSION

Appellant respectfully submits that the appellee's motion to dismiss Appellant's appeal to this Court from the Order of the Court of Appeals of the State of New York dismissing appellant's appeal to that court for the reason that no substantial constitutional questions were presented, should be in all respects denied for the reasons that (1) the appeal was timely taken, (2) the enlargements were properly granted, (3) the federal questions raised on the appeal are substantial, and (4) the judgment below does not rest upon an adequate non-federal basis.

Respectfully submitted,

RALPH B. RAUKX
Attorney for Appellant
Richard Howard Jones

Dated: New York, New York
June 9, 1966.

END